No. 14113

In the
United States Court of Appeals
For the Ninth Circuit

UNITED TRUCK LINES, INC., a Corporation, and OREGON-WASHINGTON TRANSPORT, a Corporation, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Stripped to its bare essentials, the Answering Brief of the United States of America, hereinafter referred to as the appellee, in effect is arranged under the same subject headings as those contained in Appellant's Opening Brief. Therefore, we shall arrange this reply brief under the same subject headings as are contained in appellee's answering brief with the discussion under each of these headings directed to the particular points raised by appellee's answering brief.

Before proceeding to a discussion of the contentions of appellee, one important matter must be disposed of. This is a statement on page 6 of their reply brief—"that the only question presented is: whether or not

the operation across the Columbia River was an operation on any public highway within the meaning of Section 306(a), Title 49 U.S.C.A." They then accuse appellants of presenting a separate and different question under the title "Appellants were not engaging in an interstate operation on the ferry" and that it is "wholly irrelevant."

In the first place, the sole question presented is clearly set out in our Specification of Error on page 6 of our brief and need not be restated here. The phrase "within the meaning of Section 306(a) of the Interstate Commerce Act" contained therein is clearly broad enough to include this question under our argument.

In the second place, appellants appealed "from each and every ruling, order or finding" contained in the judgment of the trial court dated August 28, 1953 (R. 21) which grounds specifically appear in the Notice of Appeal (R. 27).

Counsel for appellee overlooks the fact that appellants contested the jurisdiction of the trial court upon the ground that this was not "an interstate operation over the public highways within the meaning of Section 306(a), Title 49, U.S.C.A. Therefore, the Specification of Error and Notice of Appeal sufficiently apprised appellee of the contentions we would make on appeal.

I.

Appellee's Contention That the Ferry Near Umatilla Is a Public Ferry Is Erroneous.

Appellee in its argument under this heading, advances two propositions to support its contention. The first is based upon the premise that the ferry corporation has set out for one of its objects in its articles of incorporation, the carrying on of a general ferry business. The second, is that it has by its conduct, extended its service to the public generally (Apps. Ans. Br. p. 10). The first contention is sufficiently answered by the fact that a mere announced purpose in its articles of incorporation could not alone operate to elevate its status to that of a public ferry. *State v. Portland General Electric Co.,* 52 Ore. 502, 95 Pac. 722, 98 Pac. 160.

The second contention could not be decisive of the real issues here for the reason that a holding out to serve the general public may operate to create the *common law status* of a common carrier, but it does not create the *legal status* of a public ferry.

The case of *Munn v. Illinois,* 94 U.S. 113, relied upon by appellee goes no farther than to hold that grain warehouses, even though privately owned, are sufficiently clothed with a public interest so as to be legitimate subjects of regulation under the police powers. Furthermore, in determining the single question involved the Supreme Court also inquired into such factors as monopoly, utility and necessity. This case obviously goes no farther than to hold that any facility used by the general public may be regulated. Contrary to the statement of appellee that "inquiry by the court

was directed at the actual service performed * * *," the court was concerned only with the *power* to regulate and not the *status* of the warehouses.

Appellee has set forth as a quote on page 9 of its brief, a statement that we could not find in the majority opinion of Mr. Chief Justice Waite and apparently it is just a creation of appellee, pieced together from disjunctive phrases. A portion of the actual language appears as follows which may be somewhat similar:

> "In their exercise, it has been customary in England from time immemorial, and in this country from its first colonization, to *regulate* ferries, common carriers, hackmen, bakers, millers, wharf enginers, innkeepers, etc. * * * " *Munn v. Illinois, supra.* (Emphasis supplied)

Here, the Chief Justice was speaking of the subjects of regulation only. Later in the same opinion when discusing the justification for regulation he said:

> "Thus, as to ferries, Lord Hale says, in his treatise *De Jure Maris,* 1 Harg. L .Tr. 6, the King has 'a right of franchise or privilege that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the King. He may make a ferry for his own use or the use of his family, but not for the common use of all the King's subjects passing that way; because it doth in a consequence tend to a common charge, and is become a thing of public interest and use, * * *. So if one owns the soil and landing places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; * * *.' "

Here lies the essence of the distinction between a public ferry and this ferry. A public ferry exists as a monopoly and way of necessity under a special franchise which protects it from competition and non-compensatory rates. In return for this privilege of monopoly and protection, it owes a duty of charging only a reasonable toll and rendering reasonably continuous service which duties may be enforced by law. It accepts its franchise upon the condition that it will discharge its duties to the public. But a ferry without a franchise or license, as in the instant case, owes a duty to no one. It charges whatever it pleases and runs only when it wants to and is accountable to no one for failure to do so which is something a public ferry could not do. All other ferries in Oregon and Washington exist only by franchise and are regulated to the extent of being required not to abandon their service without permission. Appellee correctly quoted the law as stated in 22 Am. Jur., page 553, Section 2, on page 9 of its brief, but should have added the following sentence which reads:

> "His ferry is not open to the public at its demand. He may, or may not, keep it going."

This ferry is not open to the demand of the public and it may cease operating whenever it wants to.

II.

Appellee's Contention That the Absence of Regulation Does Not, in Law, Affect the Public Nature of the Ferry Is Fallacious.

In the first place, appellants did not contend that the existence or non-existence of *regulation* as that term is usually understood, determined the legal status of this

ferry. What we did contend, was that the existence of *a franchise is a condition precedent* to the existence of a *public ferry* because it is in law an actual *creation of local franchise.* The distinction between private and public ferries is aptly stated in 36 C.J.S., page 679, Section 2 as follows:

> " * * *, a distinction is made between private ferries which riparian owners may under certain restrictions establish for their own convenience, and public ferries which are franchises that cannot be exercised without the consent of the state and must be based on grant, license, or prescription."

Nor does the right of navigation on navigable waters confer the right to operate a ferry without a franchise. *State v. Faudre,* 54 W.Va. 122, 46 S.E. 269.

Appellee's citation of the *Bowles* case on page 11 of their brief is not applicable to the issue involved here. In that case, Weiter was registered as a contract carrier but held himself out to everyone as a common carrier, so the Court found him to be one. It is extremely difficult to understand how a case dealing with a common law status based upon a course of conduct can have any applicability to determining the legal status of a ferry. Since a public ferry is a *creation of franchise,* it seems immaterial whether it is a common or a contract carrier. Here, we are dealing with the *existence* of a status and not its conduct or classification.

Appellee on page 11 ambitiously states that: "The Supreme Court has directly ruled on this proposition." We do not know what they meant by "proposition." Presumably they meant that the Supreme Court has ruled that the states may not require a franchise of a

ferry on navigable waters bordering their state. If this is what they meant they proceeded to refute their own statement by the following quotation on page 12 of their brief:

> "Admittedly, the states could invoke 'police power' regulation under their recognized sovereign jurisdictions."

And again on page 14:

> "The sovereign rights of states to license or franchise ferries is universally recognized so long as the regulation imposed is not an undue burden on interstate commerce."

And also in their footnote on page 15:

> "We are mindful that this Court in the *Canadian Pacific* case, supra, after reviewing the decision in *Vidalia v. McNeely,* supra, and other related cases said: 'These cases do not sustain the contention that a franchise was not an essential element of a ferry.' "

From the foregoing, it seems apparent that the Supreme Court has never rejected the common law concept of a public ferry. And, as to the power of the states to license ferries, the propositions set forth by appellee only affirms that under their reserved police powers, the states, and not the federal government, have the authority to establish ferries upon waters forming a boundary between the states. *Candadian Pacific Railway Co. v. U.S.* (C.A. 9, Wash.) 73 F.(2d) 831, 833.

Appellee contends on page 13 of its brief that we claimed the non-existence of a franchise was the *sole reason* for the finding of this Court in the above decision. They overlooked our statement on page 16 of

our brief that the Court applied "three concurrent tests."

> "One, the conventional seagoing construction of the vessels; two, the character of the service provided in that it did not furnish a connecting link for highway traffic; three, the absence of compliance or attempt to comply with local ferry laws."

Among these three "tests," the existence of a franchise is a very "essential element" of a ferry as your decision makes clear.

Both the *Vidalia v. McNeely* (274 U.S. 676) and *Buck v. Kuykendall* (267 U.S. 307) cases cited by appellee go no farther than to hold that a state has no power to arbitrarily withhold a franchise but it still may require one.

III.

Appellee's Contention That the Umatilla Ferry Is a Public Highway Within the Purview of Section 306(a) Is Erroneous.

Appellee admits on page 19 of its brief that the physical ferry, itself, is not a highway but contends that the service rendered by the ferry was a "highway service" because it furnished the facility of a continuous and connecting route between two highways.

There are two answers to this. The first is found in the cases cited by appellee in its brief which upholds the proposition, relied upon by us, that a ferry is a highway only when it is a continuation of or a necessary link in two highways. The second answer lies in the fact that we did not actually use the ferry as a "highway" to reach a public highway on the Oregon side but

merely as a boat or ferry service to reach our private road on the Oregon side on Umatilla Island. Hence, it was not a "highway service" but a pure "ferry service" in order to serve the entire reservation as it is stipulated we could do. This point cannot be over-emphasized since the very status of a ferry as a highway depends upon whether it is actually used as a connecting link in a highway. The following quotation from *Conway v. Taylor,* 1 Black 629, 17 L.ed. 201 will illustrate this concept:

> "A ferry is in respect of the landing place, and not of the water."

Remembering that the ferry is made for the road, not the road for the ferry, because the road is the principal, the status of this ferry as a highway on the Oregon side must be determined from *its landing place,* which in this case was our private road. If we had been using the ferry to reach a public highway on the Oregon side, then in a literal sense this ferry would be a continuation of the highway, but such is not the case here.

IV.

Appellee's Contention That the Appellants Operated Within the State of Oregon Over Public Highways Is Erroneous.

Appellee under this argument first points out the fact that Umatilla Island is owned by the United States Government in that it *"has reserved and exercised jurisdiction over that area."* After having admitted this fact they then state that it is necessary to "correct various errors of appellants both as to the facts and the law." They then quote from our brief a statement to

the effect that Umatilla Island was a part of the McNary Dam reservation (App's. Ans. Br. p. 22). Next, they make the statement that "the ferry operation is conducted wholly and totally *outside* of any part of the dam reservation (Stip., par. III, R. 17)—in Oregon, in Washington and across the river." They also state in a footnote on page 22 of their brief that: "The ferry road extends due south and is wholly *without* the reservation." (App's. Ans. Br. p. 22, 23). These two assertions are contrary to the actual facts as can be shown by reference to their own argument on page 27 of their brief as follows:

> "In the second place, the *withdrawal* of 'Umatilla Island' by the Secretary of the Interior did not affect the state's primary title and jurisdiction over the waters of the Columbia River within the territorial limits of Oregon." (Emphasis supplied)

In this statement, they have admitted that Umatilla Island has been "withdrawn" from public lands and yet they deny it is a reservation. As a matter of fact, relying upon the premise that this island had been withdrawn, the trial court in its opinion, set out on page 22 of the Transcript of Record, found the following:

> "The ferry on the Oregon side docked on *property of the United States Government, namely, Umatilla Island,* and United's trucks proceeded from that point via a *private road* to the point of destination, *the McNary Dam site which is also on government property.*" (Emphasis supplied)

It seems reasonable to assume that the trial court

intended that "government property" is land withdrawn or reserved to the United States and hence a reservation since it had already been stipulated that the McNary Dam site is a reservation of the United States Government and it described Umatilla Island in the same terms as it did McNary Dam site. To further support this, the actual facts, as they were known to the trial court and the appellee should be placed before this Court in order to clarify what appellees meant by the term "withdrawal" on page 27 of their brief. In their Preliminary Statement on page 2 of their brief, they set out certain statements, some of which are wholly outside the record and others are only partly true.

The true facts as agreed upon by all of the parties and the trial court are that the ferry in question landed at a point on the shore on the Oregon side of the river which is known as Umatilla Island. The true ownership of this island had been in dispute for many years until a hearing was held which resulted in holding that Umatilla Island was an island in existence when the state of Oregon was admitted into the Union in 1859 and therefore public lands of the United States based upon the ruling of the Supreme Court in *Scott v. Lattig,* 227 U.S. 229 (1913). (See Official Decision No. A-24715 of the Secretary of the Interior, dated May 19th, 1949.)

Having established that this island is public land of the United States, the question then is what is its present status. Since appellee has pointed out that it is "withdrawn," we shall point out by whom.

Historically, the property has been withdrawn from public lands ever since August 19, 1905, when it was reserved for the Umatilla Reclamation Project. Lands "withdrawn" are no longer public lands and become a reservation. *U.S. v. Minidoha and S.W.R. Co.* 176 Fed. 491.

Appellee states on page 23 of its brief that appellants persistently attempted to prove before the trial court that Umatilla Island was part of the McNary Reservation but that "they failed to do so because it is not a fact."

Appellee in its Preliminary Statement would have this Court believe that the withdrawal relied upon by the trial court was this withdrawal of 1905 by the Secretary of the Interior when they well know that the trial court had before it, when it wrote its opinion of August 28, 1953, a certified record of the Land and Survey Office of the United States Department of Interior, Bureau of Land Management, showing that Public Land Order No. 606 of September 13, 1949, withdrew public lands for use of the Department of the Army for flood control purposes, reserved for McNary Dam in T. 5 N., R. 28 E., W.M., Washington, Section 2 Lots 1, 2, 3, 4, 6, 7 and 8; Section 4, Lots 1, 2 and 3 SENE, SENW, NESW, and all islands in the Columbia River in this township. Umatilla Island is admittedly included in this withdrawal order.

This withdrawal was made pursuant to Section 141, Title 43, U.S.C.A., which authorizes withdrawals of public lands for water power sites, which is one of the purposes of the McNary Dam project. This last with-

drawal of 1949, being in aid of commerce and navigation, of course took precedence over earlier withdrawals including reclamation purposes. Therefore, all of Umatilla Island was part of the McNary Dam reservation which makes their statement that the ferry road is wholly *without* this reservation incorrect.

As the only basis for their assertions, appellees point to the Stipulation on page 17 of the record at Paragraph II where it is stated that the ferry leases from the state of Oregon its approach on Umatilla Island. But they had already contradicted this by pointing out that this was stipulated in error before it was discovered the island was government property (App's. Ans. Br. p. 5).

Appellees have set out on page 4 of their brief a statement that on September 15, 1952, the Bureau of Land Management leased the island to the River Terminals Company. This statement is simply a claim of appellees that was never accepted by the trial court. The only evidence used by the trial court as the basis of its finding that Umatilla Island is "Government Property" was the withdrawal order set out above for the McNary Dam Project, and the original decision that it was public land.

The only reason that we did not state the foregoing facts in our Opening Brief is because we thought that the status of Umatilla Island as a government reservation had been fully settled by the Opinion of August 28, 1953, which finding we were not contesting. For this reason we did not designate the record applicable to this issue in our Designation of Contents. If this

Court feels that the opinion of August 28, 1953 (R. 21) does not completely settle this point, it has no alternative but to disregard our argument on this contention in this appeal because of lack of a complete record.

In our argument before the trial court, we attempted to prove that the area of withdrawal referred to above, or limits of the reservation proper, included not only Umatilla Island but extended to the approximate middle of the river which is the boundary of the State of Washington. However, the trial court did not pass upon this contention in its opinion because it said it was immaterial, in view of its previous finding that the ferry was a public highway (R. 22, 23). By this it meant that it was immaterial whether the ferry was *inside or outside* the reservation from the middle of the river to the shore on Umatilla Island, since it was still a public highway.

Appellees correctly pointed out that Oregon took title, upon its admission to the Union in 1859, to the waters, and land underneath, of the navigable Columbia River within its territorial boundaries described on page 26 of their brief. However, this does not affect the basis of our contention because we never claimed that the *McNary Dam reservation on the Oregon side was not within the territorial boundaries of Oregon.* Admittedly, the reservation on the Oregon side is within the boundaries of that state. But they are still federal territories in a jurisdictional sense even though situated within the territorial confines of a given state. This will be made clear from the following citation from *Lowe v. Lowe,* 150 Md. 592, 133 A. 729, 733, 46 A.L.R. 983, wherein the Court said:

> "The great weight of authority is to the effect that lands acquired in accordance with the provisions of the Federal Constitution cease to be a part of the State, and become federal territory, over which the federal government has complete and exclusive jurisdiction and power of legislation."

Therefore, it does not follow that the ferry was operating *outside* the reservation. In our brief, we did say that *"the facts,* as found by the trial court on page 22 of the Transcript of Record, *disclose* that the operation was performed entirely within the confines of the reservation, etc." If we meant to imply that the trial court found this, we were in error. What we meant was that the "facts" as set out by the trial court in its opinion, *disclose* this, not that the court disclosed this. We simply thought that the Court's opinion settled this as a fact and based our contention on this understanding. It is still our contention that the ferry was *within* the reservation even though within the territorial limits of Oregon. Appellees overlook the fact that Oregon took title to these waters *subject to an easement* in the federal government for development of commerce and navigation. *Shively v. Bowlby,* 152 U.S. 1, 47, 48, 57, 58. *Barney v. Keokuh,* 94 U.S. 324, 338; *Brewer-Elliot Oil and Gas Co. v. U.S.,* 260 U.S. 77, 83, 85. Since McNary Dam project is a flood control and navigation project it is in aid of commerce and navigation. For this reason, it was not necessary to buy the land under the water upon which the dam is situated from the two states. It is, incidentally, in this sense that we maintained the ferry was within the reservation.

As the trial court stated, it was immaterial as to the confines of the reservation since it had found we were on a public highway and Section 306(a) extends jurisdiction of the Commission to transportation "on any public highway, or within any reservation under the exclusive jurisdiction of the United States * * * " (R. 23-24). Admittedly, operations *over a public highway* within a government reservation falls within the provisions of this section. But private roads are not included because the Commission has consistently held that operations within a reservation are a matter for local control. In *Missouri-Pacific Transportation Co., Extension,* 51 M.C.C. 545, the Commission said:

> "The circumstances which control the route to be followed and terminals within the reservation are local problems which properly may be left to the managerial discretion of the applicant, and the regulation of local authorities. The extent to which applicant may operate within the military reservation beyond the entrance via Kansas Highway 92 is a matter which may be determined by applicant and the military officials of the reservation."

Appellees argue on page 25 of their brief that the *North Coast Transportation Co.* case, 3 Fed. Car. C., Par. 30,019, cited on page 26 of our brief, is not applicable "because the traffic was intrastate." But this is wholly incorrect because that case plainly states that the applicant there sought a "certificate in interstate or foreign commerce." The carrier actually sought to extend its authority to transport passengers from points outside the state to points inside of the reservation proper because it already had authority up to the en-

trance to the reservation. This extension from the entrance into the reservation was held not to be a movement from a state to a state but to a federal territory and therefore not within the scope of Section 306(a).

The same situation is applicable here despite the fact that the territorial boundary of the State of Oregon is crossed at the middle of the river, providing this ferry is not a public highway. Therefore, the entire validity of the third argument of our opening brief depends upon a determination of the status of a ferry.

CONCLUSION

For the reasons stated in our Opening Brief and in this Reply Brief we believe that the appellants, in using this ferry only as a means of serving the entire reservation, were not carrying on an interstate operation on a public highway from the middle of the river to the landing on Umatilla Island within the meaning of Section 306(a), Title 49, U.S.C.A.

Therefore, the order of the District Court denying appellants motion to dismiss was an error and should be reversed with instructions to grant the said motion and dismiss the information.

Respectfully submitted,

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